MAPLE AMALGAMATED SDN BHD & ANOR v. BANK PERTANIAN MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
MOHAMAD ZABIDIN DIAH JCA
RAVINTHRAN PARAMAGURU JCA
[CIVIL APPEAL NO: A-02(NCVC)(A)-553-03-2019]
3 APRIL 2020

BANKING: *Banking facility – Islamic financing – Financing facility in accordance with bai' bithaman ajil principle – Estate land – Charge against land – Default by borrower in repayment of facilities – Bank sought to realise charge – Whether financing agreements and securities valid documents – Whether documents contravened s. 214A(1) of National Land Code – Whether transfer of estate land could only be done with approval of Estate Land Board – Whether there was intention to transfer, convey or dispose of land – Whether agreements resulted in transfer or attempted transfer of land*

LAND LAW: *Charge – Validity of – Financing facility in accordance with bai' bithaman ajil principle – Estate land – Charge against land – Default by borrower in repayment of facilities – Bank sought to realise charge – Whether financing agreements and securities valid documents – Whether documents contravened s. 214A(1) of National Land Code – Whether transfer of estate land could only be done with approval of Estate Land Board – Whether there was intention to transfer, convey or dispose of land – Whether agreements resulted in transfer or attempted transfer of land*

The first appellant obtained an Islamic financing facility from the respondent in accordance with the principle of *bai' bithaman ajil* ('BBA') in the amount of RM48,000,000 to part-finance the purchase of a piece of land. In accordance with the workings of the BBA finance facility, the parties executed an asset purchase agreement ('APA') and asset sale agreement ('ASA') and later, a supplementary agreement ('SA'). Under the APA, the respondent purchased the land for RM48,000,000 on cash basis. Under the ASA, the first appellant repurchased the land from the respondent at a selling price of RM81,088,810.32 on deferred payment basis. The difference between the sale price and the purchase price represented the profit of the bank for granting the finance facility. On the same day as the execution of the APA and ASA, the second appellant, a contributory of the first appellant, executed a guarantee and indemnity agreement as security for the BBA. A charge was also registered in favour of the respondent over the land as further security. Upon default of the first appellant to make payments under the BBA finance facility, the respondent entered judgment against both the appellants

and proceeded to realise the legal charge and obtained an order for sale. By this application, the appellants sought (i) a declaration that the ASA, APA, SA, the charge and the guarantee and indemnity agreement were null and void; (ii) an order directing the Registrar of Title to expunge the charge; (iii) an order for the second appellant to be released from all his obligations from the guarantee and indemnity agreement; and (iv) restitution by the respondent of all proceeds, benefits, payments and monies received from the first appellant which totalled RM18,276,257.99 with interest of 10% per annum. In dismissing the appellants' application, the High Court Judge ('HCJ') found that the APA, ASA, SA, the guarantee and indemnity agreement, and the charge did not contravene s. 214A(1) of the National Land Code ('NLC'). The HCJ reasoned that the execution of the APA, ASA and SA did not involve any actual transfer, conveyance or disposal of land and that the execution of the documents was merely part of the process of availing the BBA finance facility. Hence, this appeal.

Held (dismissing appeal with costs)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The BBA transaction is essentially a financing transaction that is carried out *via* a double sale, *ie*, the APA and ASA. Each of the agreements categorically and unreservedly referred to the sale of the beneficial interest in the property in question from one party to another. Although there is no contravention of contract law and is a valid contract, the transaction must be distinguished from a regular sale and purchase agreement where only a single sale agreement is executed and where there is an intention to transfer property. (para 25)

(2) The BBA agreement would only appear to be a sale and purchase agreement if the two double sale agreements, the APA and ASA, are read separately without considering the concept of the BBA. The fact that the respondent had undertaken to finance the purchase of the property by the first appellant also militated against any suggestion that the respondent had intended to vest in itself the ownership of the property. The legal charge registered in favour of the respondent also suggested that the remedy of the respondent in the event of default of repayment lies in realising the charge rather than becoming owner of the land. Thus, there was no intention to transfer, convey or dispose of the subject land by the mere execution of the APA and ASA but to avail the Islamic financing facility. Therefore, s. 214A(1) was not breached by the execution of the ASA and ASA without the approval of the Estate Land Board. (para 26)

(3) The sub-heading of s. 214A reads as 'control of transfer of estate land'. The legislative intent and policy behind s. 214A is to prevent fragmentation of estate land. Section 214A(1) only applies at the point

of submissions of the relevant documents to effect a transfer of ownership on the land register. Hence, the transfer of estate land must not be attempted or done without the approval of the Estate Land Board. (paras 29 & 30)

(4) Section 10(1)(a) criminalises the act of transferring, conveying, or disposing estate land or any attempt thereof in contravention of sub-s. (1) of s. 214A. The APA and ASA, being part of a double sale arrangement under the BBA Islamic financing facility, did not result in a transfer or attempted transfer of property. Subsection 10(1)(b), which enacts that execution of an agreement to convey or dispose of estate land is proof of contravention of the principal section, is not applicable either as it refers to disposal of land to two or more persons. Therefore, s. 214A(1) was not breached when the parties executed the APA and ASA. Further, the APA and ASA did not fall foul of s. 214A(1) and thus, the validity of the guarantee and indemnity agreement was affirmed. (paras 31 & 33)

(5) In view of the finding that s. 214A(1) was not transgressed when the BBA documents were executed, the argument that the charge was registered in violation of written law could not be sustained. There was also no merit in the submission that the charge was registered *via* a void instrument. In determining whether an instrument suffers from 'insufficiency', the instrument alone must be considered without resorting to any other extraneous document (*Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd*). The appellants in the affidavits filed in this case had not pointed out any irregularity or defect in the instrument by which the charge was registered under NLC. (para 35)

Case(s) referred to:

Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Sdn Bhd & Ors [2016] 1 LNS 1156 CA ***(refd)***

Chai Sau Yin v. Liew Kwee Sam [1962] 1 LNS 21 PC ***(refd)***

Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1996] 1 CLJ 576 HC ***(refd)***

Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1998] 3 CLJ 605 CA ***(refd)***

Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals [2019] 1 CLJ 153 FC ***(dist)***

Hj Hamid Ariffin & Anor v. Ahmad Mahmud [1976] 1 LNS 36 FC ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(dist)***

Kuwait Finance House (Malaysia) Bhd v. Vesta Energy Sdn Bhd & Ors [2012] 9 CLJ 516 ***(refd)***

Low Chin Meng v. CIMB Islamic Bank Bhd [2015] 5 CLJ 324 CA ***(refd)***

Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd [2017] 4 CLJ 24 FC ***(refd)***

Legislation referred to:
Kedah Malay Reservations Enactment (No. 63), s. 6
Malay Reservations Enactment 1930 [Kelantan], ss. 7(i), 12
National Land Code, ss. 10(1)(a), (b), 214A(1), (2)

For the appellants - Gopal Sri Ram, Wong Rhen Yen, Jamie Wong, Ng Yee Chien, Pang Wilson & Marcus Lee; M/s KY Sim & Co
For the respondent - R Vinayaga Raj & G Ratha; M/s Skrine

[Editor's note: For the High Court judgment, please see Maple Amalgamated Sdn Bhd & Anor v. Bank Pertanian Malaysia Berhad [2019] 1 LNS 395 (affirmed).]

Reported by S Barathi

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] This is an appeal against the decision of the High Court which dismissed the originating summons of a borrower (first appellant) and a guarantor and contributory (second appellant) under an Islamic financing facility to invalidate the same and the two related securities, namely a legal charge over a parcel of land and a guarantee and indemnity agreement. The basis of the application was that the Islamic financing facility agreement in question contravened s. 214A(1) of the National Land Code ('NLC'). The provision enacts that approval of the Estate Land Board must be obtained before any estate land is disposed of.

[2] It is not disputed that the land referred to in the Islamic financing facility in question and the land which is the subject matter of the legal charge is estate land and that the requisite approval has not been obtained. It must also be mentioned that the Islamic financing facility in question was fully disbursed by the respondent and that the first appellant defaulted in repayment of the loan.

Background Facts

[3] The first appellant is the registered proprietor of a piece of land held under HS(D) 20109, Lot 11445, Mukim Durian Sebatang, Perak Darul Ridzuan ("the subject land"). The second appellant is a contributory of the first appellant. The respondent is a bank licensed under Development Financial Institutions Act 2002.

[4] The first appellant obtained an Islamic financing facility from the respondent which is in accordance with the principle of *bai' bithaman ajil* (BBA). The finance facility amount was RM48,000,000. The purpose of the facility was to part-finance the purchase of the subject land by the first appellant. In accordance with the workings of the BBA finance facility, the

parties executed an asset purchase agreement (APA) and asset sale agreement (ASA) on the same day, ie, on 24 June 2008. A supplementary agreement (SA) was signed on 25 July 2008. Under the APA, the respondent purchased the land for RM48,000,000 on cash basis. This was basically the financing amount or loan granted to the first respondent. Under the ASA, the first appellant repurchased the land from the respondent at a selling price of RM81,088,810.32 on deferred payment basis. The difference between the sale price and the purchase price represents the profit of the bank for granting the finance facility. In a conventional bank loan, the bank would earn interest instead of a profit from the sale transaction. And the deferred payments under the ASA would be the equivalent of instalment payments in a conventional bank loan.

[5] On the same day as the execution of the APA and ASA, the second appellant executed a guarantee and indemnity agreement as security for the BBA. A charge was also registered in favour of the respondent over the subject land on 3 October 2011 as further security. Upon default of the first appellant to make payments under the BBA finance facility, the respondent entered judgment against both appellants in High Court Civil Suit No: WA-22M-39-03-2017 on 17 July 2017. The respondent also proceeded to realise the legal charge and obtained an order for sale *via* Ipoh High Court Civil Suit No: AA-24FC-526-06-2017 on 18 May 2018.

[6] The appellants filed the instant originating summons to invalidate the BBA agreements, the guarantee and indemnity agreement, and the charge. The prayers sought by the appellants are as follows. The first prayer is for a declaration that the ASA, APA, SA, the charge and the guarantee and indemnity agreement are null and void. The second prayer is for an order directing the Registrar of Title to expunge the charge. The third prayer is for an order for the second appellant to be released from all his obligations from the guarantee and indemnity agreement. The fourth prayer is for restitution by the respondent of all proceeds, benefits, payments and monies received from the first appellant which totaled RM18,276,257.99 with interest of 10% per annum.

[7] The learned High Court Judge dismissed the originating summons. He found that the APA, ASA, SA, the guarantee and indemnity agreement and the charge did not contravene s. 214A(1) of the NLC. He reasoned that the execution of the APA, ASA and SA did not involve any actual transfer, conveyance or disposal of land and that the said execution of the said documents was merely part of the process of availing the BBA finance facility. In support, he cited the case of *Low Chin Meng v. CIMB Islamic Bank Bhd* [2015] 5 CLJ 324 and the case of *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1996] 1 CLJ 576.

Whether s. 214A(1) Of The NLC Contravened?

[8] The principal issue that arises in this appeal is whether the terms of BBA instruments through which the loan facility was made available, namely the APA and ASA contravened s. 214A(1) of the NLC given the fact that the subject land is estate land. The contentions of the parties on this issue are as follows.

Contentions Of The Appellants

[9] The argument of the appellants, briefly stated, is as follows. Section 214A(1) of the NLC reads as follows:

> (1) Notwithstanding anything contained in this Act, no estate land is capable of being **transferred, conveyed or disposed of in any manner whatsoever**, unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under sub-section (3). (emphasis added)

[10] Learned counsel for appellant drew our attention to the words of the above provision that we have given emphasis. He submitted that the provision is wide enough to cover any manner of transfer, conveyance or disposal of estate land without the approval of the Estate Land Board. We were referred to the following clauses of the APA and ASA:

> Clause 12 of the APA
>
> **Beneficial ownership in and/or rights to the Asset shall pass** to the Bank upon the execution of this Agreement and the Customer at the request by the Bank execute all relevant documents necessary to transfer the asset to the Bank or its nominees.
>
> Art 1 of the APA
>
> Al-Bai Bithaman Ajil is an agreement for the deferred payment of the sale of the Asset in accordance with the Syariah principle of Al-Bai' Bithaman Ajil **whereby the ownership of the Asset shall be transferred to the Customer** in accordance with Clause 4 hereof and the payment of the Sale Price shall be payable by Installment stated herein.
>
> Clause 4 of the ASA
>
> **Beneficial ownership and/or rights to the Asset shall pass to the Customer** upon execution of this agreement. (emphasis added)

[11] Counsel for appellants submitted that under the above-mentioned clauses of the ASA and APA, the respondent had passed the ownership of the property to the first appellant and *vice versa*. In support of the argument that the beneficial ownership can be transferred under the ASA and APA, the case of *Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Sdn Bhd & Ors* [2016] 1 LNS 1156; [2017] 2 MLJ 686 was cited. Two Islamic financing facilities

were involved in that case. There were also several financiers as a syndicated loan was involved. The transaction relevant to the discussion at hand is the Islamic Financing facility known as *Bai' inah* which also utilises the double sale method with the APA and ASA and the deferred payment mode. But in that case, the financier sold its property on a deferred payment basis to the borrower under the ASA. The financier signed an APA to buy back the property on cash basis. This was essentially the loan granted to the borrower. The deferred payments under the ASA that were due from the borrower constituted the instalment payments under the said finance facility. The borrower defaulted and the financier sued for judgment.

[12] The summary judgment application of the financier failed before the High Court. The appeal was allowed by this court and the financier obtained summary judgment. The part of the Court of Appeal judgment relied on by the appellant is this. At the High Court, the borrower called into question the validity of the *Bai' inah* documents, ie, the APA and ASA. The High Court Judge described them as "fictional" and said that they would contravene the law of contract. The Court of Appeal disagreed with this description. Rohana Yusuf JCA (now PCA) cited *Low Chin Meng v. CIMB Islamic Bank Bhd* (*supra*), *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605; [1998] 3 MLJ 393 and *Kuwait Finance House (Malaysia) Bhd v. Vesta Energy Sdn Bhd & Ors* [2012] 9 CLJ 516; [2012] MLJU 1762 and said that the sale of beneficial interest is accepted and acknowledged by the courts in an Islamic banking transaction and does not contravene the law of contracts. Rohana Yusuf JCA also noted in passing that the borrower had benefited from the transaction and should not be allowed to raise issues on the terms that were voluntarily agreed upon.

[13] During oral arguments, counsel for appellants further emphasised that the court must look at the substance of the agreements in question which purported to transfer ownership of property. He submitted that it is irrelevant that the said agreements were part of an Islamic financing facility. He said that there was no provision in the said agreements for the approval of the Estate Land Board to be obtained. He pointed out that the agreements in questions are unconditional agreements unlike in the case of *Gula Perak Bhd v. Datuk Lim Sue Beng & Other Appeals* [2019] 1 CLJ 153. That case involved a conventional syndicated term loan. The sale and purchase agreement in respect of the land in dispute in that case contained a condition precedent that the approval of the Estate Land Board must be first obtained. The Federal Court ruled that s. 214A(1) of the NLC was not contravened. We shall shortly return to discuss this case in some detail.

[14] Counsel for appellants also cited the case of *Hj Hamid Ariffin & Anor v. Ahmad Mahmud* [1976] 1 LNS 36; [1976] 2 MLJ 79 to support his argument that an agreement entered in contravention of statute is void. In that case, Malay reservation land was sold by a Malay owner to a Siamese purchaser in contravention of s. 6 of the Kedah Malay Reservation Enactment (No. 63). Suffian LP held that the sale was void *ab initio* and could not be enforced by the purchaser.

[15] Finally, for good measure, counsel for appellants cited the case of *Chai Sau Yin v. Liew Kwee Sam* [1962] 1 LNS 21; [1962] 1 MLJ 152 and submitted that the appellant herein is entitled to rely on its own illegality. In that case, the respondent who is a rubber grower sold rubber to a partnership. But only one partner possessed a license to purchase rubber. When the partnership was sued for payment, the license holder and another partner submitted to judgment. The remaining partner (the appellant) defended the action. The Privy Council held that as the purchase of rubber was prohibited by law, the appellant was entitled to rely on his own illegality.

Contentions Of The Respondent

[16] The respondent's position is that s. 214A(1) of the NLC does not apply as the ASA, APA and SA are part of the Islamic Financing transaction and do not involve any transfer, conveyance or disposal of estate land. Counsel for respondent submitted that the parties had no intention to effect any transfer, conveyance or disposal of the property. He cited two decisions of this court that discussed the issue of transfer of property in an Islamic financing transaction.

[17] In *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1998] 3 CLJ 605; [1998] 3 MLJ 393, the Islamic financing facility in question was also a BBA which was effected through a double sale with the deferred payment method. The subject land in the purchase agreement and sale agreement was Malay Reservation Land. The land was also charged in favour of the financier. The issue that arose for the determination of the Court of Appeal was whether the said agreements and the charge contravened s. 7(i) of the Malay Reservations Enactment 1930 of Kelantan that prohibits any transfer or transmission or vesting of any right or interest of a Malay in Malay Reservation Land to or in any person not being a Malay. Section 12 of the Enactment provides that contravention will result in the transaction being rendered null and void. The Court of Appeal affirmed the decision of the High Court that found that the said provisions were not breached by the said agreements and the charge.

[18] The second case cited on this point was *Low Chin Meng v. CIMB Islamic Bank Bhd (supra)*. The Court of Appeal said in this case that the simultaneous executions of APA and ASA are in accordance with the concept and operation of the BBA finance facility.

[19] In respect of the application of s. 214A(1) of the NLC, counsel for respondent cited the Federal Court case of *Gula Perak Bhd v Datuk Lim Sue Beng & Other Appeals (supra)*. He argued that the provision only bites at the time when transfer of ownership is registered on the land title. We referred to this case earlier. It does not involve an Islamic financing transaction. But the subject land in question is estate land.

[20] The brief facts of above mentioned case are as follows. A group of banks provided a syndicated term loan to the borrower (Gula Perak Bhd). Upon default of repayment, judgment was entered against Gula Perak Bhd and guarantor. Gula Perak Bhd was subsequently wound up and administered by liquidators. At the date of winding up, Gula Perak Bhd was indebted to one of the financiers (AmBank Bhd) in the sum of RM81,037,450. Gula Perak Bhd issued 3% redeemable secured bonds for a nominal value of RM90,124,000 to settle the loan. The bonds were secured by a charge over an estate land which was later substituted with a deed of assignment. AmBank Bhd could not realise its landed security because Faithmont Sdn Bhd had entered a caveat on the land. Faithmont Sdn Bhd sued to claim for specific performance pursuant to a sale and purchase agreement in respect of the land. The sale and purchase agreement contained a condition precedent that the approval of the Estate Land Board must be obtained. Faithmont Sdn Bhd also sued AmBank Bhd because of the caveat that the latter entered on the land. These and other related suits were consolidated. But the dispute was successfully mediated and the parties entered into a compromise and a consent order was entered. The condition precedent in the said sale and purchase agreement was incorporated in the consent order. The liquidators sought to sell off the land to settle the debt of Gula Perak Bhd. The application to sell the land was objected to by a contributory of Gula Perak Bhd and a creditor. The objection was dismissed by the High Court but the decision was reversed by the Court of Appeal.

[21] At the Federal Court, the issues in all the leave questions of the parties were fused into the following common issue:

> Whether a conditional agreement to sell an estate land (SPA) to a purchaser with a condition precedent that the sale was subject to obtaining the approval of the Estate Land Board is in breach of s. 214A(1) of the NLC when no prior approval is obtained from the Board before entering into the said SPA?

[22] The Federal Court by a majority answered the above question in the negative and allowed the appeal. The Federal Court ruled that the conditional agreement in question was not prohibited by s. 214A(1) of the NLC. The APA, ASA and SA in the instant case are not conditional agreements. Nonetheless, counsel for respondent argued that the judgment is authority for the proposition that s. 214A(1) of the NLC only applies at the time when change of ownership is registered on the title at the land office.

Our Decision

[23] We have carefully considered the argument of counsel for appellants that the relevant clauses of the APA and ASA which we reproduced earlier speak of transfer of beneficial ownership of property and that they do not contain any condition precedent that obliges the parties to obtain the approval of the Estate Land Board. However, after considering the nature of the transaction in question and after reading s. 214A as a whole, we are of the view that the APA and ASA did not contravene sub-s. (1) of the said section.

[24] We are mindful that the sale of beneficial interest is accepted and acknowledged by the courts in an Islamic banking transaction (see *Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Sdn Bhd & Ors (supra)*). In the above-mentioned case, the sale of beneficial interest was recognised in order to uphold the validity of the BBA instruments, namely the APA and ASA which was challenged by the borrower. In our view, the determinative issue in the instant case is not whether the APA and ASA on the face of the clauses that were highlighted by the appellants refer to the sale of beneficial interest and that it is recognised by the courts. The determinative issue is whether the Islamic banking transaction in question comes within the ambit of s. 214A(1). We find that it does not for two main reasons.

[25] The first reason has to do with the nature of the BBA transaction. It is essentially a financing transaction that is carried out *via* a double sale, ie, the APA and ASA. It may well be that each of the agreements categorically and unreservedly refers to sale of the beneficial interest in the property in question from one party to another. This aspect of the agreement was noted by the Court of Appeal in *Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Sdn Bhd & Ors (supra)*. The court said that there was no contravention of contract law and ruled that it was a valid contract. However, the transaction must be distinguished from a regular sale and purchase agreement where only a single sale agreement is executed and where there is intention to transfer property. This court had occasion to address the distinction between a sale and purchase agreement *simpliciter* and the loan arrangement *via* an APA and ASA in *Low Chin Meng v. CIMB Islamic Bank Bhd (supra)*. Idrus Harun JCA (as he then was), speaking for the Court of Appeal emphasised the requirement of the APA and ASA in a BBA finance facility in the following passages:

> [55] *Learned counsel for the appellant, in submitting that the transactions had contravened s. 67, had urged this court to accept that the second BBA facility was not a loan transaction, instead it was merely an asset sale and purchase transaction simpliciter between the company and the respondent*. With respect to learned counsel, his argument is fallacious. The letter of offer dated 17 April 2009

A clearly states that the respondent had approved the Term Financing under the concept of "*Bai Bithaman Ajil*" which is an Islamic financing facility executed in accordance with Syariah law.

[56] We must emphasise that the execution of the sale and purchase of the property by parties involved is a prerequisite in the concept of Islamic
B financing of "Al Bai Bithaman Ajil". The sale and immediate resale of the property which are carried out by executing asset purchase and sale agreements form an essential step in this mode of Islam financing before the company could avail itself of the financial facilities provided by the respondent. *Thus, it is wholly erroneous for the appellant to say that the BBA transactions were asset sale and purchase transactions simpliciter.*

C (emphasis added)

[26] The Court of Appeal in the above-mentioned case emphatically rejected the notion that the BBA transaction was an asset sale and purchase transaction *simpliciter*. The BBA Islamic financing facility was recognised for
D what it is and not for it appears to be. It was recognised as a loan transaction. We should think that the BBA agreement would only appear to be a sale and purchase agreement if the two double sale agreements, ie, the APA and ASA are read separately without considering the concept of the BBA. The fact that the respondent had undertaken to finance the purchase of the property in question by the first appellant also militates against any suggestion that the
E respondent had intended to vest in itself ownership of the said property. Furthermore, the legal charge registered in favour of the respondent would also suggest that the remedy of the respondent in the event of default of repayment lies in realising the said charge rather than becoming owner of the land. Thus, there was no intention to transfer, convey or dispose of the
F subject land by the mere execution of the APA and ASA but to avail the Islamic financing facility. For the above reasons, we find that s. 214A(1) was not breached by the execution of the APA and ASA without the approval of the Estate Land Board.

G **[27]** We also find merit in the second argument of learned counsel for respondent. He submitted based on the *Gula Perak* case that if s. 214A is read as a whole, sub-s. (1) can be construed to apply only at the point of registration of ownership on the title document at the land office.

[28] At the outset, we agree with learned counsel for appellant that the facts
H of the *Gula Perak* case are distinguishable from the instant case. The sale and purchase agreement in the *Gula Perak* case had a condition precedent in that the approval of the Estate Land Board must be obtained. The main reason for the majority decision of the Federal Court is that the condition precedent in the sale and purchase agreement precluded the application of s. 214A(1) of the NLC. This reason is stated clearly in the following passage of the
I judgment:

> [49] Section 214A(1) of the NLC does not prohibit the making of a conditional or contingent agreement to sell an estate land which has an express term incorporated in it that the intended sale is subject to the parties obtaining the approval of the Land Board. The prohibition under s. 214A(1) is against an act of transfer, conveyance or disposal of estate land without the approval of the Land Board. The SPA being a conditional or contingent agreement is therefore not illegal for non-compliance with the provisions of s. 214A(1) of the NLC. Until the approval of the Land Board was obtained and the pre-condition was then fulfilled, future performance under the agreement remained unenforceable. The SPA shall not take effect unless and until the condition is fulfilled when the Land Board's approval is obtained. The SPA by itself did not have the effect of transferring or disposing the said land from Gula Perak to Faithmont.

[29] However, the legislative intent and policy behind s. 214A were also considered in the majority judgment of the Federal Court. It was to prevent fragmentation of estate land. The Federal Court came to this conclusion after considering the Supreme Court case of *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 and the speech of the Minister in the Parliamentary Hansard. And after considering all the 12 subsections of s. 214A(2), Ramly Ali FCJ speaking for the majority, said as follows in the following passage:

> [50] Subsection 214A(2) throws some light on the interpretation of sub-s. 214A(1). It prohibits the Registrar of Land Title from registering any instrument of transfer of estate land unless such instrument is accompanied by a certificate of approval granted by the Land Board. *The clear inference from this subsection is that the element of control or prohibition on transfer, conveyance or disposal of estate land starts effectively at the stage of forwarding all the relevant documents to the Registrar of Land Title for registration of the transfer of title. By reading sub-s. (1) and sub-s. (2) together one will get the indication that the Land Board's approval needs only to be obtained at the stage before registration of title is to be done, but not before that*. (emphasis added)

[30] The above-mentioned passage in the majority judgment of the Federal Court may be technically *obiter dicta* as the decision turned on the fact that the sale and purchase agreement in question was a conditional agreement. Nonetheless, we find the reasoning in the said passage to be persuasive. We also note that the subheading of s. 214 reads as "control of transfer of estate land" as noted by the majority of the Federal Court. Thus we are of the view that s. 214A(1) only applies at the point of submissions of the relevant documents to effect a transfer of ownership on the land register. The transfer of estate land must not be attempted or done without the approval of the Estate Land Board.

[31] For sake of completeness, we have also considered s. 10(1)(a) of the NLC which criminalises the act of transferring, conveying, or disposing estate land or any attempt thereof in contravention of sub-s. (1) of s. 214A. In our view, this section would not apply for reasons given earlier. The APA and ASA being part of a double sale arrangement under the BBA Islamic financing facility did not result in transfer or attempted transfer of property. Section 10(1)(b) of the NLC which enacts that execution of an agreement to convey or dispose of estate land is proof of contravention of the principal section, is not applicable either as it refers to disposal of land to two or more persons. Therefore, for the above reason as well, we find that s. 214A(1) was not breached when the parties executed the APA and ASA.

[32] We shall now address the application of the appellants to invalidate the guarantee and indemnity agreement, and the legal charge. The appellants' case is that the "subsidiary security documents" are null and void because there was failure to obtain the approval of the Estate Land Board for the APA and ASA. In the written submissions, the case of *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd (supra)* was cited. We do not see the relevance of the said case. The case has nothing to do with a guarantee or a charge. It was a caveat case. The seller entered a private caveat alleging that estate land was transferred without approval. The Supreme Court in allowing the caveat to remain said as follows:

> ... it would be proper and just that the caveat should remain in force and the suit should go for trial to determine whether on the evidence as they are presented to the Court the transfer is void *ab initio* or just invalid and of no effect.

[33] However, during oral arguments before us, counsel for appellant submitted as follows. He submitted that because the APA and ASA violated s. 214A(1), it follows that the guarantee and indemnity agreement is illegal. Our short answer to that is that for reasons given earlier, we found that the APA and ASA did not fall foul of s. 214A(1) and thus we affirm the validity of the guarantee and indemnity agreement.

[34] In respect of the legal charge, counsel for appellant argued that it was registered in violation of written law, ie, s. 214A(1) and is therefore void. It was also submitted that the registration was obtained by void instrument. Our finding in respect of the above challenges to the legal charge are as follows.

[35] Firstly, in view of our finding that s. 214A(1) was not transgressed when the BBA documents were executed, the argument that the charge was registered in violation of written law cannot be sustained. Secondly, in respect of the submission that the charge was registered *via* a void instrument, we find no merit in it for the following reason. In the case of *Malaysia Building Society Bhd v. KCSB Konsortium Sdn Bhd* [2017] 4 CLJ 24; [2017]

2 MLJ 557 which was cited by counsel for respondent, the Federal Court said that in determining whether an instrument suffers from "insufficiency", the instrument alone must be considered without resorting to any other extraneous document. In the instant case, the issue is whether the instrument is "void" but we see no reason why the same principle should not apply. The appellants in the affidavits filed in this case have not pointed out any irregularity or defect in the instrument by which the charge was registered under NLC.

Conclusion

[36] For all the reasons that we have given above, the appeal is wholly dismissed with costs of RM20,000 which shall be subject to allocatur.